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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 55

A. E. McDONALD,

Petitioner

vs.

ERNEST O. THOMPSON, ET AL,

Respondents

BRIEF OF RESPONDENTS

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Corrections, A. E. McDonald vs. Ernest O. Thomp
et al, No. 55

Case of Barnwell Bros. v. South Caroline Highway Dept., 17 Fed. Supp. 803 should read "reve 58 Sup. Ct. 510"instead of "affirmed" as shown in the Index.

On page 2, Subdivision B, "Contentions of Respondents in Trial Court" should read "Co tentions of Petitioner in Trial Court"; sam correction in Index.

On page 3, the word "not" on line 22 (counting from the top down) should be "now".

On page 14 in citation Texport Carriers Corporat strike out "Aff. 54 Sup. Ct. 129".

On page 13 after the word "consent" in line 4 (co ing from bottom of page up) insert words as foll "as to interstate carriers".

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 55

A. E. McDONALD,

Petitioner

vs.

ERNEST O. THOMPSON, ET AL,

Respondents

BRIEF OF RESPONDENTS

INTRODUCTORY STATEMENT

Counsel for Petitioner have advised that they are relying upon brief as filed in support of the Petition for the Writ of Certiorari; however Respondents desire to file this brief in lieu of brief heretofore filed in opposition to the Petition for Writ of Certiorari, and herewith request that this brief be so filed and

considered.

STATEMENT OF THE CASE

A. How Case Reached this Court

This case reached the United States Circuit Court of Appeals by an appeal by E. O. Thompson, C. V. Terrell and Lon A. Smith, constituting the Railroad Commission of Texas, and Walton D. Hood, W. B. Renfro and Tom Miller, employees of The Railroad Commission of Texas, from a final decree (R-42-45) of the District Court of the United States for the Northern District of Texas, restraining the Respondents individually and in their official capacities, and their agents, servants, representatives and employees, from causing either directly or indirectly, in any way the molestation, arrest or interference with the drivers of Petitioner's trucks, and from in any way impeding, or interfering with Petitioner's business in the transportation of property in interstate commerce in any manner whatsoever. On April 12, 1938 the Circuit Court of Civil Appeals reversed the judgment and remanded with instructions to dismiss the bill. See *Thompson et al* v. *McDonald*, 95 Fed. (2d) 937 (R-159-170), and thereafter Petitioner filed his Petition for Writ of Certiorari in this Court, which was granted October 10, 1938.

B. Contentions of Respondents in Trial Court

Petitioner in his Bill of Complaint alleged that

he had been regularly operating in interstate commerce by motor vehicle for hire for many years prior to June 1, 1935, and at all times since that date and was prior to said date, and is now, engaged in the business of transporting property by motor vehicles through and between the States of Texas and Oklahoma, and between intervening points situated in different states; that in engaging in such transportation he had used within the State of Texas Federal Highways Nos. 75, 77, 80, 81, 290, 90 and 281, which are federal aided highways; that by an Act of Congress, known as the Motor Carrier Act of 1935, the sole and exclusive power, jurisdiction and authority to regulate transportation in interstate commerce had been vested in the Interstate Commerce Commission; that under the provisions of said Act he had applied to the Interstate Commerce Commission for a certificate of public convenience and necessity, and would be entitled to receive such certificate as a matter of right under what is known as the Grandfather Clause; that the jurisdiction over, and regulation and control of his business was not exclusively in the Interstate Commerce Commission; that by reason of his application for permit under the Grandfather Clause he was entitled to continue in the transportation of property as a common carrier without a certificate or permit until such time as the Interstate Commerce Commission may act upon his application; that the Railroad Commission of Texas refused to issue to him license tags or numbers that are required to be affixed by all motor vehicles carrying property in the transportation business as common carriers in the State of Texas, and

have issued orders and instructions to arrest all drivers and stop all trucks of Petitioner, because Petitioner had no permit from the Railroad Commission of Texas to operate; that he had been engaged exclusively in the transportation of property in Interstate Commerce for a long time prior to June 1, 1935, and had built up a lucrative transportation business; that his drivers had been arrested by the employees of the Railroad Commission of Texas and his business had been hindered and interfered with by said Commission, and its agents, servants, and representatives (R-1 to 18).

C. Decrees of Trial Court

The Judge of the United States District Court, for the Northern District of Texas, Fort Worth Division, on the sworn Bill of Complaint of Petitioner filed January 17, 1936, on that date issued a temporary restraining order citing Respondents to appear on the 24th day of January, 1936 to show cause why a temporary injunction should not be granted. (R. 17, 18, 19). On the 13th day of October, 1936, on motion made the trial Court amended its decree so as to recite that Respondents Motion to Dismiss had been overruled and proper exception taken, and that all proofs offered in evidence of January 25, on hearing of preliminary injunction would be considered as in evidence on trial on the merits, at which time the respective parties offered their additional proofs, upon which the court based its judgment. (R. 42).

D. Answer and Evidence of Respondents

On the 24th day of January, 1936, the Respondents filed a Motion to Dismiss the Bill of Complaint (R. 19-22), and on the 30th day of April, 1936, filed their First Amended Answer. (R. 22-32).

The Respondents offered in evidence their First Amended Answer and attached Exhibits "A" to "(j)", verified by Tilden L. Childs, (R. 22-33) (R. 152), said Exhibits being a part of said Answer, which Exhibits it was agreed should be forwarded to this Court as a part of the Record, (R. 138) and which are on file in this Court, which Exhibits have been printed in this Court as supplement to the record. From this affidavit of Tilden L. Childs, and the Exhibits attached thereto as a part thereof, the following facts appear, as set out in Respondents' Amended Answer, introduced in evidence:

1. That in 1934 Petitioner secured from the Railroad Commission of Texas his Special Commodity Carrier Permit to haul only livestock distributed by the Agricultural Department of the State of Texas between Texas points, which said Special Commodity Permit was on October 25, 1934 cancelled by the Railroad Commission of Texas. (R. 26), and (Respondents Original Exhibits "A" & "B".)

2. That in May, 1934, Petitioner filed an application with the Railroad Commission of Texas for a certificate as a common carrier in interstate commerce. A hearing was had upon said application,

testimony heard, and Order entered July 14, 1934, denying same. (R. 26-27) and (Respondents Original Exhibits "C", "D" & "E".)

3. That thereafter Petitioner filed in the District Court of Travis County an appeal from said Order denying his application and secured an injunction against the Commission from interfering with his operations, from which judgment the Respondents appealed to the Court of Civil Appeals, 3rd Judicial District, which said Court reversed the judgment of the trial court and dissolved the injunction and at the time of the final hearing of this cause the time for filing a Motion for Rehearing had expired, and the judgment of the Court of Civil Appeals dissolving the injunction became final. The opinion of the Court of Civil Appeals dissolving this injunction is reported in 90 S. W. (2d) 581. (R. 27 and Respondents Original Exhibits "F", "G", "H" & "I").

4. While said appeal was pending in the Court of Civil Appeals Petitioner filed with the Railroad Commission of Texas another application for a common carrier certificate to engage in intrastate commerce. (R. 28 and Respondents original Exhibit "J").

5. Petitioner was never authorized to use the highways of Texas by permit or certificate or otherwise from the Railroad Commission of Texas, except the Special Commodity Permit granted March 30, 1934 and cancelled October 15, 1934. (R. 29-30).

6. The Order of the Railroad Commission of Texas denying the application of Petitioner for a certificate as a common carrier in interstate commerce made specific *findings of fact upon which the denial was based as to the use of the highways generally by trucks, and denied such permit on the ground that the use of the highways would place an undue burden upon the physical properties of the highways themselves, and would endanger public safety and would interfere with the use thereof by the public.* (R. 29-30 and respondents original Exhibit "E").

7. That Petitioner's operations have not been under any certificate or permit granted by the Railroad Commission of Texas but under the protection of an injunction issued by the District Court of Travis County and dissolved by the Court of Civil Appeals as shown above, and he has never operated under any permit or authority of the Railroad Commission of Texas, except the Special Commodity Permit which was cancelled October 15, 1934. (R-28).

8. That should Petitioner file his application to use the highways in his alleged exclusive interstate transportation business, the Railroad Commission of Texas would only require him to prove highways were capable of withstanding such transportation business and that traffic thereon would permit; and would not require him to show convenience and necessity or consider adequacy of existing transportation facilities or the effect such proposed operation would have on existing transportation facilities and

upon showing that the "highways proposed to be used by him are capable of withstanding proposed use without undue injury and damage to said highways and without unreasonable interference with the use of said highways by the general public for ordinary purposes", it would authorize him to operate over such highways. (R-32). Respondents offered other evidence as shown in record. (R. 152-154).

E. Trial Court's Finding of Facts and Conclusions of Law

The trial Court found as facts in the case that the Respondent had caused the arrest of Petitioner's truck drivers and had delayed and tied up Petitioner's trucks and have filed criminal complaints against Petitioner's drivers and threatened and will continue to interfere with and put a stop to Petitioner's operations; (R-35) that for a long time prior to June 1, 1935, and at all times since Petitioner has been continuously in bona fide operation engaged in the business of transporting property for hire over the highways of Texas and Oklahoma exclusively in interstate commerce; (R-35), that in such transportation he uses highways designated as federal highways, Nos. 75, 77, 80, 81, 290, 90 and 281; that all of the highways used by Petitioner are federal aided highways except a portion of No. 281; (R-35-36) that Petitioner had filed his application with the Interstate Commerce Commission for a certificate and had filed his tariffs and rates with the Interstate Commerce Commission, and had on file

with the Railroad Commission of Texas public liability and property damage insurance; (R-36), that he did not transport property in intrastate commerce (R-36), that all of his trucks had been registered in the State of Texas and are in good mechanical repair. The trial Court concluded as a matter of law that the Motor Carrier Act of 1935 superseded the Texas Motor Truck laws, insofar as said Texas laws give to the Railroad Commission of Texas power to forbid the use of federal highways by Petitioner's trucks when engaged exclusively in the transportation of property in interstate commerce. (R. 37-38). It further concluded that the definition of bona fide operator in the Motor Carrier Act relates to the actual, physical, continuous and regular operation of such carrier, and further concluded, as a matter of law, that Petitioner was in bona fide operation on and prior to June 1, 1935, and has been continuously in such operation since said date, and that Petitioner has complied with all applicable police requirements of the State of Texas. (R. 37-38).

F. Holding of Circuit Court of Appeals

The Court held that the Federal Motor Carrier Act of 1935 did not supersede the Texas Motor Carrier Laws (Art. 911 (b) Vernon's Ann. Civ. St. of Tex.) in so far as said Texas Motor Carrier Laws delegate to the Railroad Commission of Texas authority and power to prohibit peti-

tioner from using the said highways of said State as a common carrier engaged in transportation of property for hire by motor vehicles exclusively in interstate commerce until petitioner has complied with said State Motor Carrier Laws by filing application for such authority with the Railroad Commission of Texas and by making proof to said Commission that the structure of the highways proposed to be used by Petitioner was such that their proper preservation would not be impaired by the use sought by Petitioner and that the safety of the public upon said highways over which Petitioner sought his route would not be unreasonably endangered and that the additional use which he expected to impose upon said highways would not so congest traffic as to render them unsafe for the traveling public. (R. 159-173).

STATUTES INVOLVED

Federal Motor Carrier Act of 1935, Ch. 8, Title 49 USCA.

Article 911B Vernon Ann. Civil Statutes of Texas.

Article 1690 (B) Vernon Ann. Penal Code of Tex-

as.

A portion of the Texas Statutes are printed in appendix. These Texas statutes are herein referred to as the Texas Motor Carrier Laws applicable to subject matter of this suit.

SUMMARY OF POINTS INVOLVED

POINT I.

The Federal Motor Carrier Act does not supersede or conflict with the Texas Motor Carrier Laws insofar as the State laws authorize its Railroad Commission to deny both interstate and intrastate motor carriers for hire the use of the highways, when to grant such use the proper preservation of such highways would be impaired or the traffic on such highways would be so congested as to render them unsafe for the traveling public, including both intrastate and interstate carriers for hire theretofore issued permits to use such highway. See *Commonwealth* v. *Kennedy*, 195 Atlantic 770; *South Carolina State Highway Department* v. *Barnwell Bros.*, 58 S. Ct. 510.

The provisions found in Sections 308(a) and 309(b) of the Federal Motor Carrier Act clearly show that the Interstate Commerce Commission was given no authority to limit the use of

such highway after a permit was granted, thus clearly indicating that as to the exercise of such matters the Congress was content to leave the same with the various states.

Section 307(b) says:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

Clearly Congress did not by such Act grant away the State's proprietary or property rights in the use of the highways, as it is recognized that the State owns the highways and is charged with the duty of maintaining them. See Morris v. Duby, 24 U. S. 135, 47 S. Ct. 548, State v. Limestone Co., 114 Tex. 345.

Section 304 of the Act states the powers and duties of the Interstate Commerce Commission is conclusive that the Congress neither by direct or implied legislation intended to legislate as to the matter of highway conservation and regulation of traffic thereon. See: Salvage v. Jones, 53 Law Ed. 1182, 225 U. S. 501, at page 533, and cases cited in main argument and this point.

POINT II.

Prior to the enactment of the Federal Motor Carrier Act, the Federal Courts had uniformly held that the State Railroad Commission had the authority to refuse an application for an interstate permit for motor

transportation for hire, if the conditions of the highway over which such transportation was to be conducted was such that the permit or authority to so use them should be denied, if necessary, for the protection of the highways from inordinate and unsafe uses, and the protection and safety of those having the primary right to use such highways. *Sage* v. *Baldwin*, 55 Fed. (2d) 968; *Texport Carrier Corporation* v. *Smith*, 8 Fed. Supp. 28; *Wald Storage and Transfer Co.* v. *Smith*, 4 Fed. Supp. 61 aff. 54 Sup. Ct. 129; *Galveston Truck Line Corporation* v. *Allen*, 2 Fed. Supp. 488; *Stephenson* v. *Binford*, 50 Fed. (2d) 509 aff. 54 Sup. Ct. 227; *C. A. Bradley* v. *Public Utility Commission of Ohio*, 53 S. Ct. 577.

POINT III.

Prior to and at the time the Federal Motor Carrier Act was passed, it was settled law that the Texas Motor Carrier statutes prohibited the intrastate as well as the interstate motor transportation of property for hire over its highways by any carrier except on securing from the State Railroad Commission its consent authorizing such transportation. and such consent was grantable without further consideration upon showing that the highway and the traffic hereon would permit such additional transportation.

See Article 911B, Section 3, Vernon's Annotated Civil Statutes of Texas; *Railroad Commission* v. *Southwestern Greyhound Lines*, 92 S. W. (2d) 296; *Texport Carriers Corporation* v. *Smith*, 8 Fed. Supp. 28 aff. 54 Sup. Ct. 129; *Wald Storage and Transfer Co.* v. *Smith, supra; Beard* v. *Smith*, 4 Fed. Supp. 61, affirmed 290 U. S. 596; *Sage V. Baldwin*, 55 Fed. (2d) 968; *Stephenson* v. *Binford*, 287 U. S. 251, and *Sproles* v. *Binford*, 286 U. S. 274.

POINT IV.

Obviously, unless state laws as they have been applied have been superseded, no common carrier or contract carrier as defined in the Federal Motor Carrier Act could successfully claim "Grandfather Rights" as to Texas Highways under Section 306 and Section 309 of the Act, unless on June 1, 1935 if common carrier, or on July 1, 1935, if contract carrier, it was operating under authority of the Railroad Commission of Texas, duly issued under the laws of such State, because any operation otherwise would not be bona fide as required by the Federal Motor Carrier Act, but would be unlawful.

McDonald's operations on and prior to June, 1935, as alleged by him, might have been bona fide insofar as the highways of the State of Oklahoma were con-

cerned, but within the bounds of the State of Texas they were clearly unlawful, and the filing of application for a certificate under his claim for "Grandfather Rights" would confer no right to continue his unlawful operations over the highways of Texas, pending a determination of such application. See *Town-of-Conway* v. *Atlantic Coast Line R. Co.* 20 Fed. (2) 250, at par. 11 on page 259, and other cases cited under argument, point IV.

POINT V.

The extent to which the Texas Motor Carrier Statutes were construed to be applicable to interstate transportation property for hire by motor vehicles prior to the Federal Motor Carrier Act is sustained by the courts as a necessary exercise of the State's police power, and if the Congress has constitutional authority to supersede such laws as construed and applied, then such state statutes should not be held to be superseded by Federal act unless they conflict in such a way that the two acts cannot be "reconciled or consistently stand together." See cases cited under argument of points V and VI.

POINT VI.

The Texas Motor Carrier Statutes as here-

tofore held applicable to interstate transportation property for hire by motor carriers are not regulations of interstate commerce or directed against such commerce, but are recognized police powers reserved to the State to regulate the rights of the State and the public as to the use of its highways and preservation thereof, and promotion of safety thereon, and since such State regulations are equally applicable to interstate as well as to intrastate carriers without discrimination, and they do not conflict with any expressed or assumed will of Congress expressed or necessarily implied in the Federal Act, they must be sustained. See cases cited under argument of points V and VI.

POINT VII.

Congress, at the time the Federal Motor Carrier Act was passed, no doubt was familiar with the decisions of this court recognizing the State's police power over its highways as to preservation thereof and promotion of safety through regulations of traffic thereon applicable to interstate as well as to intrastate motor carriers for hire alike without discrimination, and its failure to legislate expressly on the subjects of highway

conservation and traffic thereon, its Act must be construed as leaving such powers within the State to be exercised by that authority only, to be disturbed when the State acts in such a manner as to constitute an undue burden on interstate commerce. Cases cited under argument on point VII.

POINT VIII.

Since the Federal Act is not in conflict with the applicability of the Texas Motor Carrier Act as to the State's police power to conserve and protect its highways and to promote safety by regulation of traffic thereon under statutes and orders of the Railroad Commission applicable to interstate as well as intrastate carriers, and recognized by the decisions of this court at the time of its enactment, the use of the words, "bona fide operations" in Sections 306 and 309 of the Federal Act must be given a meaning consistent with the general purposes of the Act. See cases cited under argument on points IV and VIII.

ARGUMENT

POINT I.

Does the Federal Motor Carrier Act super-

sede the Texas Motor Carrier Laws (Art 911B, Vernon's Annotated Civil Statutes of Texas) so far as the State statutes apply to interstate carriers as to conservation and protection of the state highways and traffic condition thereon?

This suit was instituted and prosecuted by Petitioner by basing his cause of action on the ground that the Federal Act had in fact superseded the state motor carrier statutes. A determination of this question necessarily involves a consideration of the two acts. In our argument under Points II and III it is shown that the State statutes were applicable to interstate carriers prior to and at the time the Federal Act was passed and here we will only consider the Federal Act, its provisions and court decisions relating to its application. The declaration of policy as set out in Sec. 302(b) of the Federal Act shows that the provisions of the Act are to be applicable only to interstate carriers, since any regulation as to highway conservation and traffic conditions thereon must necessarily regulate interstate as well as intrastate carriers as to highway use and traffic conditions thereon; and Congress by so limiting its declaration of policy has shown an intent not to assume any control over the subject matter of highway conservation or regulation of traffic thereon to promote safety by preventing such highways from becoming unduly congested by the operation of commercial carriers thereon. That such was the intent of Congress is clearly shown by a

proviso inserted in Sec. 308 and 309 of the act reading as follows:

> "Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

These provisos place a restriction upon the Interstate Commerce Commission that would prevent it from interfering with one of its certificate holders from increasing the number of trucks upon any highway covered by the permit even if such increase should be denied on the ground that the highways were too congested or the physical condition of such highways or parts thereof would not permit the increase in use without undue injury to them. This same provision would prevent the Interstate Commerce Commission in issuing a certificate originally from limiting the number of trucks the certificate holder could place upon the state's highways even if conditions above existed. Section 304 of the Act sets out the duties and powers of the Interstate Commerce Commission and the provision of this section clearly shows that the matters of highway conservation and promotion of safety thereon by preventing undue amount of commercial transportation is not a subject the commission is authorized to deal with.

It is well recognized that the State of Texas has a proprietary and property right in its highways and Congress clearly indicated its intent not to in-

terfere with the states' rights as to such interest in its highways by inserting in the Act the section as follows:

> "Certificate not to confer proprietary or property rights in the highway. No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways." (Section 307(b)

The Supreme Court of Texas in the case of *Robbins et al* v. *Limestone County et al*, 114 Tex. 345 has held that the highways of the state belong to the state, and in the case of *Morris* v. *Duby*, 274 U. S. 135, 47 Sup. Ct. 548, this court has recognized the state's proprietary or property rights in these highways including those built with Federal aid by language as follows:

> " * * * An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. * * * Conserving limitation is something that must rest with the road supervising authorities of the state, not only on the general constitutional distinction between national and state powers, but also for the additional reason having regard to the argument based on a contract that under the convention between the United States and the state in respect to these jointly aided roads, the maintenance after construction is primarily imposed on

the state. Regulation as to the method of use therefore necessarily remains with the state and cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them. There is no averment of the bill or any showing by affidavit making out such a case."

This court in the last mentioned case had under consideration the Federal Highway Act. Clearly Congress by inserting Sec. 307(b) in the Federal Motor Carrier Act expressly provided that the state's proprietary or property rights in the highways would not be impaired but remain subject to full exercise by the state within the limitations in quotation last above. This court also in the case of South Carolina *State Highway Department* v. *Barnwell Bros.*, 58 Sup. Ct. 510, at page 514-515 has more recently spoken upon this subject as to the extent of operations covered by the Federal Motor Carrier Act as follows:

"But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which

is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned, and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."

The Superior Court of Pennsylvania in the case of *Commonwealth* v. *Kennedy*, 195 Atlantic, at page 770 has construed the Federal Act as follows:

"* * * but a careful examination of the provisions of the Federal Motor Carrier Act 1935 discloses to us no intention on the part of Congress to interfere with the well-recognized authority of cities to regular motor vehicle traffic within their borders and designate which of their streets may or may not be used for transportation of passengers and property by motor vehicles for pay, provided such regulations and limitations do not discriminate against nor impose an undue burden on interstate commerce. As we read the act, Congress has not seen fit to commit the duty or authority to the Interstate Commerce Commission and it remains as it was before the passage of the act of 1935. The act of Congress of 1935 specifically provides that 'no certificate issued under this chapter shall confer any proprietary or property rights in the

use of the public highways' (part 2, Sec. 207(b), U. S. Code Title 49, Sec. 307(b), 49 U. S. C. A. Sec. 307(b).) * * * In the light of these provisions we are of opinion that the act of Congress of 1935 does not deny to the states the power to adopt reasonable regulations limiting the use of their highways by motor carriers engaged in operating vehicles in transportation of passensengers or property for pay in both interstate and intrastate commerce, where necessary for the preservation of the highways or the safety, health, and welfare of the public."

An examination of Senate Docket No. 152, of the 73rd Congress, Second Session, clearly discloses that the moving cause for enacting the Federal Motor Carrier Act was not to supersede the State Motor Carrier Laws as to the right of the State to control the traffic upon its highways with the end in view that congestion thereon would be properly regulated and such highways would be protected from undue injury. The above report or document is a general review of the Motor Carrier laws of the various states of the Union prior to the enactment of the Federal Motor Carrier Act, and it is clear from this document that the evils to abate, to which the Federal Motor Carrier Law was directed, were those evils arising in a particular field or jurisdiction over which it was conceded that the various states and their respective jurisdictions had no power to legislate and regulate effectively. It was also apparent from such document that prior to the enactment of the Federal Motor Carrier Act it was recognized that the states had the inherent police power to reg-

ulate the use of their highways and to foster and preserve the instrumentalities of Intrastate Commerce.

In support of these statements, we quote from said document, which is a report of the Federal Coordinator of Transportation on the Regulation of Transportation Agencies other than railroads and on proposed changes in the railroad regulations, dated February 28th, 1934, to-wit:

> "Thus, it has been established by these decisions that a State, pursuant to its right to control and condition the use of its highways in the public interest, may validly regulate intrastate contract and private carriers in all matters which appear essential to effective regulation. No reason is perceived why Congress may not validly impose similar regulation upon the large volume of interstate commerce that is transported by contract and private carriers. Certainly its powers under the commerce clause are no less potent and all-embracing in this particular field than are the police powers of the States to control the use of their highways and to foster and preserve the instrumentalities of intrastate commerce. * * *
>
> "The full enforcement of the powers which the States may legally exercise is, however, rendered difficult or impracticable in certain respects, owing in some instances to the nonresident status of the interstate carrier but, more generally, to the lack of complete regulatory authority. Accounts, records, and reports are an example of the latter situation.

"On the other hand, a State cannot restrain wasteful competition and unnecessary operations by withholding the issuance of certificate or permit (Buck v. Kuykendall, 267 U. S. 307; Bush and Sons Company v. Maloy, 267 U. S. 317; Sprout v. South Bend, 277 U. S. 163). It has no jurisdiction over the rates, probably cannot prescribe accounts, records, and reports except for tax purposes, and cannot require bonds or insurance for the benefit of passengers or cargo (Sage v. Baldwin, 55 F. (2d) 968; Johnson Transfer and Freight Lines v. Perry, 47 F. (2d) 900; Michigan Public Utilities Commission v. Duke, 266 U. S. 570; Coordination of Motor Transportation, 182 I. C. C. 263, 373). A State has no control over the capitalization or consolidation of or the issuance of securities by interstate carriers and only a limited jurisdiction to deal with complaints.

"The suggestion which some have made that regulation by the individual States, if broadened within constitutional limits and efficiently administered, would satisfy the need for Federal legislation is therefore an impracticable one."

No doubt this report or document sounds out the principal reasons for the enactment of the Federal Motor Carrier Act, and since said document clearly recognizes the powers of the states to legislate and regulate as to the use of its highways to preserve such highways and to the end that public safety will be promoted, it is not conceivable that the Congress did intend by implied legislation or otherwise, that its Act would supersede, displace, and set aside the complicated governmental machinery of the various

states that had been set up by such states for the purpose of carrying on and conducting this all-important police power of such states in the preservation and regulation of such state highways wholly in the jurisdiction of the respective states, and a power which is recognized by all authorities as being inherent in the respective states.

Nowhere in the Federal Motor Carrier Act is there found any standards by which the Interstate Commerce Commission may proceed to regulate traffic on such highways as to safety and preservation of such highways. And under the case of *Schechter Poultry Co.* v. *United States*, 295 U. S. 495, 97 A. L. R., 966, the courts could not, even where the Commission might attempt to set up governmental machinery for the purpose of regulating and controlling the use of the vrious highways of the states as to traffic congestion and preservation thereof, approve such action on the part of the Commission because the Federal Motor Carrier Act wholly fails to set forth any standards or recognizes any authority in said Commission to carry on such governmental functions.

ARGUMENT CONTINUED

POINT II.

Prior to the passage of the Federal Motor Carrier Act the United States Courts were uniform in their decisions that the State

Commission had the authority to refuse an application for an interstate permit if the condition of the highways was such that the permit should be denied if necessary for the protection of the highways from inordinate and unsafe uses and the protection and safety of those having the primary right to use them. The first decision was Sage v. Baldwin, by the U. S. Court for the Northern District of Texas, 55 Fed. Rep. (2) 968, in which the Court said:

> "Highways belong to the public and are primarily for its use in the ordinary way, and there may be valid prohibition of a use for gain in an extraordinary way. There may be regulation of and activity which is not purely a matter of right, but which is carried on by sufferance or permission. The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is harmful to the ways themselves."

In the case of *Texport Carrier Corporation* v. *Smith*, 8 Fed. Sup. 28, involving interstate commerce the Court followed this opinion and used the following language:

> "The State of Texas, by its Motor Carrier Act, Article 911b, par. 22b, Vernon's Ann. Civil St. Texas, has declared that the business of carry-

ing property for hire over the state's highways may not be conducted as a right, but only as a privilege, and in subordination of the necessities and interests of the general public for whose use the highways were primarily designed and laid down. It has enacted laws to bring this about, and has conferred upon the Railroad Commission as statutory agent, wide powers to control and regulate the business of carrying for hire so as to adapt it to traffic and traffic conditions, and make effective the legislative declaration of policy." * * *

"When the full, definite, and concrete findings of the Commission are considered in the light of these principles, it cannot be maintained that the evidence plaintiff has offered in support of its right to institute a new motor carrier service, using forty-eight to two hundred trucks over the most used highway, and between and through the most densely populated sections of the state, has overcome those findings by showing them to be arbitrary, capricious, and unreasonable. In the light of these principles and of the evidence offered in this case, it seems plain to us that the findings and order of the Commission stand."

In the case of *Wald Storage & Transfer Company* v. *Smith*, 4 Fed. Sup. 61, it was re-affirmed in the following language:

"Prior decisions of this court, (citing cases) * * * and the recent decision of the Supreme Court of the United States in line with all of these, C. A. Bradley v. Public Utilities Comm. of Ohio, 53 S. Ct. 577, 77 L. Ed. , decided

April 10, 1933, have established the full right of the state to control, by prohibition and permit to intrastate business and its right also to control the use of the public roads by persons desiring to use them for hire as to interstate business, by prohibition and permit, in the exercise of police power of the state to promote safety of life and limb, and the convenience of use of the highways for the purposes for which they were primarily designed, as well as for the preservation of the state's property in the roads and their protection against injury and destruction.

* * * * An examination of the statutes and the decisions in the light of the Sage Case, supra, will show that though the Legislature has in terms made no distinction between inter and intrastate business, the courts have worked out a construction of the statutes which finds valid and effective, as applied to interstate business, those provisions in it which have to do with the protection of the highways from inordinate and unsafe uses, and the protection of the safety of those having the primary right to use them, while striking down those provisions which authorize the commission to refuse permits for interstate operations based on purely or mainly competitive conditions, that is, considerations of the adequacy of existing transportation facilities, and the effect of the proposed operations on such facilities."

See also *Galveston Truck Line Corporation* v. *Allen*, 2 Fed. Sup. 488; *Stephenson* v. *Binford*, 50 Fed. (2) 509. These decisions of the United States Courts rendered prior to the passage of the Federal Motor Carrier law clearly and definitely established

the principle that the Railroad Commission of Texas had the authority to preserve the highways of the State from injury and destruction, and to protect the right of the public to the use thereof against congestion as to those who sought to engage in interstate transportation as well as those who sought to engage in intrastate transportation. It appears from this record that the Railroad Commission of Texas, in the exercise of this power decreed to be lodged in it by the Courts and based on the particular elements of power which the Courts decreed, it might exercise, that is, the preservation of the highways and the protection of the traveling public, denied Petitioner's application for a permit to engage in interstate commerce over the highways designated in his application. The state has appropriate Penal Statutes and Civil Statutes authorizing penalty and injunction to enforce its Motor Carrier Laws. See Article 1690B, Vernon's Ann. Penal Code of Texas.

ARGUMENT CONTINUED

POINT III.

On June 1, 1935, and for several years prior thereto, the laws of the State of Texas forbade and prohibited the interstate transportation of property for hire over its highways by motor carriers by any person except upon and after securing, and in accordance with a certificate from the Railroad Commission of Texas.

The Motor Truck Law of Texas, Article 911b, Section 3, Revised Statutes, 1925, as amended provides as follows:

> "Sec. 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation. No motor carrier shall, after this Act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act."

Section 6a, of the same Article, provides as follows:

> "Sec. 6 (a). No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier."

It is well settled that the Texas Motor Carrier Laws give the Railroad Commission of Texas jurisdiction and authority over the use of Texas high-

ways by carriers engaged in interstate commerce, and these laws prohibit any operations over the highways except those authorized by the Commission. As to interstate carriers, the Commission is authorized to deny any such certificate upon consideration of whether the structure and preservation of the highways will permit the use proposed or whether the safety of the public will authorize such use. In *Railroad Commission of Texas et al* v. *Southwestern Greyhound Lines, Inc.*, 92 S. W. (2d) 296, decided February 26, 1936, by the Court of Civil Appeals of Texas, this very point was considered, and the court reviewed the authorities, and said:

> "It appears, therefore, that the duty is imposed upon the commission, before acting upon an application, to determine three questions: First, whether such commerce is needed to serve the public convenience; second, whether the structure and preservation of the highways will permit such use; and, third, whether, admitting both of these, the safety of the public will authorize such use. As to the first of these questions, the Railroad Commission has jurisdiction only as to intrastate commerce, and not as to interstate commerce. As to the second and third questions, under the decisions above cited, the Railroad Commission has jurisdiction both as to interstate and intrastate operations so far as they affect the highways within the State."

This case was appealed to the Supreme Court of Texas, and that court, in an opinion handed down on November 25, 1936, reversed the judgment of the Court of Civil Appeals in holding that the temporary

injunction was improvidently issued and in dissolving it.

The Court in analyzing the Federal Motor Carrier Act, 99 S. W. (2d) 268, said:

"It is manifest that it was the intention of Congress for the Interstate Commerce Commission to co-operate with the various states in the administration of the federal law. That the federal law does not displace entirely the state laws upon this subject is too plain for argument. It is only where there is an actual and distinct conflict between the laws that the state law will be displaced, and then only as to the part of the state law in actual conflict with the federal law. 9 Tex. Jr. p. 288 para. 20, and cases cited; 12 C. J. p. 15, para. 13, and cases cited. That it was the purpose of the federal law to co-operate with the states in the administration of that law is plainly set forth in its provisions."

"An analysis of the act clearly shows that it was the purpose of Congress, in enacting this law, to delegate to the Interstate Commerce Commission the exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce on the highways for a certificate of public convenience and necessity. Such construction of the law does not deprive the state from protecting its highways and the public safety by reasonable and uniform regulations, and exacting reasonable compensation for the use of such highways. Michigan Public Utilities Commission et al v. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 35 A.L.R. 1105; Buck v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 33 A.L.R. 286. It is not

necessary to discuss here the extent of the power of a state to make such rules and regulations, nor to define them, because that question is not before us."

In *Texport Carrier Corporation* v. *Smith*, 8 Fed. Supp. 28, decided August 27, 1934, by a three judge Federal Court for the Southern District of Texas, the principal question under consideration was whether the Railroad Commission of Texas had authority to deny a permit to an interstate contract motor carrier for the transportation of interstate commerce over the highways of the State of Texas. (The same State authority for operations over Texas highways is required of interstate common carriers as of contract carriers.) The Court said:

"The Commission, when operating within the sphere of its powers as statutory administration to protect the highways of the State from injury and destruction, and to secure the safety and convenience of those primarily entitled to travel thereon, has authority over contract carriers hauling interstate commerce to regulate and prohibit, as well as over those hauling intrastate.

In the case of an interstate carrier, as in the case of an intrastate carrier, if the order refusing a permit to a contract carrier hauling goods rests on findings grounded on considerations of highway safety and convenience, the same presumption attends the order and findings and the same burden is on the complainant to overthrow them. Wald Storage & Transfer Co. v. Smith, 290 U. S. 596, 54 S. Ct. 129, 78 L. Ed.

524; Bradley v. Public Utilities, 289 U. S. 92, 53 S. Ct. 577, 77 L. Ed. 1053, 85 A.L.R. 1131; cf. Interstate Transit Inc. v. Lindsey, 283 U. S. 186, 51 S. Ct. 380. It is only when the Commission has undertaken to exercise control not over the safety of the highways and of the traveling public, but over the commerce itself, that its orders refusing permits to interstate carriers are inoperative."

In *Bradley* v. *Public Utilities Commission of Ohio*, 89 U. S. 92, Supreme Court of the United States, in n opinion written by Justice Brandeis, held that n order of a public utilities commission of a State enying a common carrier by motor vehicle a certifiate to engage in interstate commerce is a valid exrcise of the police power of the State, and its effect n interstate commerce is merely incidental, if such n order is made to promote public safety and beause of highway congestion. Other cases announcg the same rule or principle are: *Wald Storage Transfer Co.* v. *Smith, supra; Beard* v. *Smith*, 4 ed. Supp. 61, affirmed Supreme Court of the United ates without written opinion, 290 U. S. 596; *Sage Baldwin*, 55 Fed. (2d) 968; *Stephenson* v. *Binrd*, 287 U. S. 251, and *Sproles* v. *Binford*, 286 U. 274.

ARGUMENT CONTINUED

POINT IV.

If the Texas Motor Carrier Laws as apied to interstate operations as shown un-

der Points II and III are not inoperative because of the Federal Motor Carrier Act, Petitioner has no "Grandfather Rights" under Section 309 or 306 of the Federal law and the Circuit Court of Appeals properly reversed and remanded with instructions to dismiss the Bill.

Petitioner at the time the Federal Act was passed was not operating upon any of the highways under authority of the Railroad Commission, but his operations were carried on at such time under protection of injunction issued by a state court restraining the commission from enforcing its order denying him authority to use such highways. This injunction was later dissolved by judgment of the Court of Civil Appeals which became final. (R-26-27, R-27 and Respondents Original Exihibits C, D, E, F, G, H, I, and J, all of which exhibits have been printed as supplement to the record in this case for the convenience of the court under supervision of its clerk). An examination of these exhibits which are a part of the evidence in this case will be convincing that the Railroad Commission was justified in denying Petitioner the use of the highways sought to be used.

Petitioner in this suit claims "Grandfather Rights" based upon his unlawful operation upon the highways of the State of Texas. His "right of way" for his interstate operations has never been secured from the constituted authorities of the state, and all of his operations have been as a trespasser

upon the state highways, and unless the state laws have been superseded as herein first stated the mere filing of his application for certificate would confer no new right upon him to continue his unlawful use of these Texas highways. See *Town of Conway* v. *Atlantic Coast Line R. Co.*, 20 Fed. (2d) 250, at page 259 where the court in speaking of a similar situation had the following to say, to-wit:

> "The defendant also contends that under the Transportation Act of 1920 (Act Cong. approved Feb 28, 1920, 41 Stat. 456), as construed by the Supreme Court of the United States in Dayton-Goose Creek R. R. Co. v. U. S., 263 U. S. 456, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472, R. R. Commission of California v. Southern Pacific Co., 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713, and New England Divisions Case, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605, it is not lawful for it now to abandon any part of its right of way without a certificate of approval from the Interstate Commerce Commission. By subdivision 18 of section 402 of the Transportation Act (41 Stat. 477 (Comp. St. Sec. 8563)) it is provided that no carrier or railroad subject to the act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall have first been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. It is conceded that no such certificate has been given in the case at bar.
> "The theory of the defendant is that the Transportation Act, as construed by the cases referred to, constitute a new departure, and sought affirmatively to build up a system of railways pre-

pared to handle promptly all the interstate traffic of the country, and that the power to order the abandonment of any track is now lodged solely in the Interstate Commerce Commission, and no change can be made without its consent. But I do not construe the act to apply to a case like the one at bar. The defendant does not seek to abandon a portion of its track. Nor does the town seek to compel it to abandon a portion where it has a legal right to remain. The act of Congress was intended to apply to those cases where the railroad company seeks to abandon a portion of its line of railroad, and possibly where it is sought to compel it to make such abandonment; but it was not intended to apply to those cases where the railroad is a trespasser, or where the railroad's occupancy is only by permission, and such permission has been revoked. "When the town in this case revoked the permission theretofore given to occupy the street, the railroad company then had no further right in the same. It may be doubted whether Congress could constitutionally deprive the town of its right to require the defendant to remove its track in such circumstances from its street, and certainly, if such a construction of the act as would render it unconstitutional can be avoided, it should be done. My view is that the act was not intended to apply to a case where the defendant's rights in the premises had ceased, and that no certificate from the Interstate Commerce Commission is necessary, and that this court has full jurisdiction to determine the rights of the parties, and to require the removal of the track if the railroad has no further legal right to keep it there."

The words, "in bona fide operation," as used in

this Federal Motor Carrier Act, we contend were intended to include both actual and legal operation. The trial court in its conclusions of law found that the phrase, "if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 over the route or routes or within the territory for which the application is made," properly construed relates to the actual, physical, continuous and regular operation of such carrier on June 1, 1935, and continuously ever since, and concludes as a matter of law Petitioner was in bona fide operation on these particular highways of the State of Texas alleged in Petitioner's Bill of Complain on and prior to June 1, 1935. These conclusions of law by the Court were based upon the testimony that the Petitioner was in actual operation in interstate commerce on June 1, 1935, although the record discloses that he never had any authority from the Railroad Commission of Texas to use the particular highways in his alleged operations.

It is a cardinal principle of statutory construction that provisions of statutes must be construed so as to give effect to every clause or word therein set forth. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. *Pillsbury Flour Mills Co.* v. *Great Northern Ry. Co.*, 25 Fed. (2d) 66, 69, *Van Dusen Harrington Co.* v. *Northern Pac. Ry. Co.*, 32 Fed. (2d) 466, 468. *Updike Grain Co.* v. *Chicago & N. W. Ry. Co.*, 35 Fed. (2d) 486, 487. *W. P. Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 82 Fed. (2d) 94, 95.

The Commission, in a long line of cases, has followed the same principle in construing and applying tariffs. *Wisconsin Bridge & Iron Co.* v. *Illinois Term. Co.*, 169 I.C.C. 197, 199. *Iola Cement Mills Traff. Assn.* v. *Atchison, T. & S. F. Ry. Co.*, 169 I. C.C. 367, 375.

Applying this rule of statutory construction to the determination of the meaning of the words "bona fide," as used in the act, it is obvious that some meaning must be ascribed to them. The Congress might have used the term "actual" had it intended only that modification of "operation," or it might have used the word "lawful" as an adjective. But the Congress did not use either of these terms for the obvious reason that it preferred a term and intended to describe an operation which was more than actual and more than legal or valid—one which was sufficiently inclusive as to embrace both of these terms. "Bona fide" does exactly that. If this meaning is not applied to the term, "bona fide" it is impossible to ascribe any other reasonable meaning to those words.

It is conceivable that a carrier might take pains to qualify under the existing laws of a great many of the states and thus be in a position to operate legally over a vast territory without actually performing service in any of it. To escape this result the Congress used the words "bona fide." The conclusion is also inescapable, as developments in the administration of the act conclusively prove, that a great many were actually operating, both regularly

and irregularly, without any attempt to comply with existing, applicable state laws and, in fact, in wanton disregard of the same. To avoid that result the Congress used the words "bona fide."

If only actual operation were intended the words "bona fide" would be surplusage. The Congress obviously sought language to apply both to actual operations and to legal operations by providing that one who was actually in operation, meaning with some degree of regularity and intent to continue and who conducted such operation in compliance with applicable laws and who therefore, by reason of the reality of such operations, was in "bona fide operation" might be exempted from the formality of proving that his service is required by the public necessity or that he is fit, willing and able to comply with the act and that his operations are consistent with the public interest.

The laws of Texas as of June 1, 1935, and thereafter, enacted under the State's police power, required each motor carrier for hire whether engaged in interstate or intrastate commerce to have a permit from the Railroad Commission. In passing upon applications involving interstate commerce under these laws, and the decisions of United States Courts construing them, the Commission was only authorized to give consideration to the structure and preservation of the highways and the safety of the public. Petitioner never had a permit or certificate from the Railroad Commission of Texas authorizing him to conduct his operations in interstate com-

merce and it seems, therefore, readily apparent that he was not in bona fide operation within the purview and meaning of the "grandfather" provision of the Motor Carrier Act of 1935 over the alleged highways in Texas. He sought by this injunction to be protected in operations over many miles of highways of Texas. The fundamental purpose of the Federal Act is to regulate in the interest of the public interstate transportation by motor vehicles for hire.

In *Motor Transit Company* v. *Railroad Commission*, 189 Cal. 573, 209 Pac. 586, the Supreme Court of California gave consideration to a statute regulating motor carriers, and which contained a so-called Grandfather Clause. The Court made a statement which is applicable to the duties of the Interstate Commerce Commission under the Federal Motor Carrier Act. It said:

> "The primary purpose of the legislature in enacting this statute was not to confer a franchise upon the operating companies, but to give into the power of the Commission for regulation and control in the interest of the public the operation of all auto stages for transportation. It did this by requiring every auto transportation company to secure from the Commission a certificate of public convenience and necessity. It relieves from the necessity of obtaining such certificates the companies actually operating in good faith at that time. The purpose in so exempting such companies was to refrain from interfering with the operations as then carried on—in other words, to confirm in these operators the rights

they were at that time exercising. But such exemption was obviously only to the extent of the operations then conducted."

In the *Golden Gate Ferry Company* v. *Railroad Commission*, 268 Pac. 355, the Supreme Court of California considered a claim of "grandfather" rights and announced the following rule:

> "The safe, definite rule, and the one supported by the reason and purpose of the Public Utilities Act, would seem to us to be to construe the language 'operating vessels in good faith' to mean operating them in good faith in the essential and inherent features of the service sought to be continued after the effective date of the Act."

As hereinbefore stated the "grandfather" rights constitute an exemption from the general terms of the law and the burden is upon those claiming the exemption to prove that he is entitled to it. This is a well established and familiar rule. In the case of *Camas Stage Company* v. *Kozer*, 209 Pac. 95, an exemption was claimed from the payment of said motor license fees. In holding that the plaintiff was not entitled to the exemption the Court said:

> "Moreover, it is a familiar rule of frequent application that he who would shelter himself under an exemption clause must present a clear case, free from all reasonable doubt, as such laws, being in derogation of the general rule, must be strictly construed as against the person claiming the exemption and in favor of the public. 17 R.C.L. 522; Northwest Auto Co. v. Hurlburt, ... Ore. . . . , 207 Pac. 161; Wallace v.

> Board of Equalization, 47 Ore. 584, 86 Pac. 365. In the enforcement of the law under consideration, the collection of a fee for registration is the rule and exemption the exception; therefore, the burden of establishing it is upon him who claims it. I. Cooley, Taxation, 3rd Ed. page 456."

It is also a familiar rule that a statute should be construed in light of the general purpose of the Act. *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S., 294, 77 L. Ed. 796, where the court said in construing the duties of the Tariff Commission:

> "The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen."

In *Piedmont & N. R. Co.* v. *I.C.C.*, 286 U. S. 299, 76 L. Ed. 1115, the Supreme Court of the United States, in construing the Transportation Act, said:

> "The transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended. Spokane & I.E.R. Co. v. United States, 241 U. S. 344, 60 L. Ed. 1037, 36 Sup. Ct. 668."

The Courts have stated that for one to be a bona fide actor it is necessary that he has complied or is proceeding to comply in good faith with the requirements of the applicable laws. This rule was announced by the Supreme Court of the United States in the case of *Hosmer* v. *Wallace*, 97 U. S. 575. The

court in that case defined a "bona fide pre-emption claimant" as follows:

> "The term bona fide, as applied to the pre-emption claimant, does not change the qualifications of such claimant, nor the conditions upon which, under the general law, a settlement with a view to pre-emption is permitted. It was intended to designate one who had settled upon land subject to pre-emption, with the intention to acquire its title, and had complied, or was proceeding to comply, in good faith with the requirements of the law to perfect his right to it."

In the case of *Godwin* v. *Tuttle*, 141 Pac. 1120 (Oregon 1914), suit was brought by the trustee in bankruptcy to recover a certain stock of goods which had belonged to the bankrupt estate. The defendant claimed to be a "bona fide holder" of the goods within the meaning of the bankruptcy law authorizing the trustee in bankruptcy to avoid any transfer by the bankrupt which any creditor might have avoided "unless he was a bona fide holder for value prior to the date of the adjudication." It seems that the defendant took possession of the stock of goods without complying with the statutes covering sales in bulk, and which required notice to creditors in case of such sale. The court held that defendant, having taken possession of the goods in violation of this Bulk Sales Law, could not be a bona fide holder for value within the meaning of the bankruptcy law.

Another decision holding that where there is a violation or non-compliance with a law, there can

be no bona fide transaction is the case of *Muzenich* v. *McCain*, 274 S. W. 88 (Missouri), where it was held that a purchaser of an automobile without compliance with the statute requiring a bill of sale and proper transfer of the license and registration certificate, could not be a "bona fide purchaser" so as to be protected under a conditional sales statute against defects in his assignor's title.

Deffeback v. *Hawke*, 115 U. S. 382, involved the right of a party who claimed certain land and had made improvements thereon. The United States Supreme Court, speaking through Mr. Justice Field, said:

> "There can be no color of title in an occupant who does not hold under any instrument, proceeding or law, purporting to transfer to him the title or to give him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation."

In the recent case of *Ranier* v. *Western Union Tel. Co.* (Mo. App.), 91 S. W. (2d) 202, it was held that a contract for transportation of goods in interstate commerce was unlawful because the truck owner had failed to obtain a permit as required by the State statute and consequently neither the truck owner nor the owner of the shipment, who had knowledge of the lack of a permit, could recover from the telegraph company for delay to the shipment resulting from delayed transmission of money.

In *Crouch* v. *First National Bank* (Ill.), 40 N. E. 974, 979, the court said:

> " 'Good faith' means 'honest, lawful intent; the condition of acting without knowledge of fraud, and without intent to assist in a fraudulent, or otherwise unlawful, scheme.' And. Law. Dict."

In *Motor Transit Company* v. *Railroad Commission*, 189 Cal. 573, 209 Pac. 586, and in *Red Ball Transit Co.* v. *Public Utilities Commission*, 112 Ohio 462, 147 N. E. 762, the Supreme Courts of California and Ohio, respectively, held that bona fide operation or good faith operation means legal operation.

In *Motor Transit Company* v. *Railroad Commission, supra*, it appears that California had enacted in 1917 a motor carrier act requiring certificates of public convenience and necessity, but that no certificate was required of those operating in good faith prior to May 1, 1917. The statute was amended in numerous particulars in 1919. One of the amendments repealed the section relating to the requirement of certificates of convenience and necessity and substituted in lieu thereof a new section containing the following language:

> " * * * but no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this Act becomes effective. * * * "

The California Supreme Court held that the words above set forth "at the time this Act becomes effec-

tive," meant June 22, 1919. Motor Transit Company had commenced certain operations subsequent to May 1, 1917, but prior to June 22, 1919. It claimed that under the 1919 statute it was entitled to continue such operations without a certificate, because it was so operating on and prior to June 22, 1919. The court rejected this claim, holding that such operations were being conducted in violation of the terms of the 1917 statute, and hence were not operations in good faith. In connection with this point, the court said:

> "It is the further contention of the petitioner that 'Auto, Stage and Truck Transportation Act' (Statutes 1917, Ch. 213, Sec. 5), having been subsequently amended by the Statutes of 1919 (Statutes 1919, Ch. 280, Sec. 3), the latter statutes must govern and control the rights of petitioners. In the former statute no certificate was required of those operating in good faith prior to May 1, 1917. The latter statute relieves from the necessity of securing such a certificate companies operating in good faith 'at the time this Act becomes effective.' (June 22, 1919). Manifestly, those companies commencing operations subsequent to May 1, 1917, without the certificate of public service and convenience required by the statute were violating the statute, and we cannot hold it to have been the intention of the legislature to confer a franchise upon auto stage companies by virtue of their operations prior to the date the amendment went into effect, when such operations, by the very terms of the former statute, would have been illegal. We are therefore constrained to hold that any rights to maintain local service without a certificate of public convenience and

necessity must have been acquired prior to May 1, 1917."

In the *Red Ball Transit Company* v. *Public Utilities Commission, supra*, the Red Ball Transit Company. a corporation had applied to the Ohio Public Utilities Commission for a certificate of convenience and necessity on the sole ground that it was operating in good faith as a motor transportation company on April 28, 1923, the date provided in the Ohio statute to fix the rights of existing operators in good faith. The certificate was issued, but was later revoked by the Commission on the ground that the applicant was not originally entitled to the certificate. It appears that there were two separate grounds for revocation, one of which was the following: Although the corporation was in fact doing business in Ohio as a motor transportation company on April 28, 1923, it was a foreign corporation, and had not been qualified to do business in Ohio, and did not so qualify until June, 1923. The Public Utilities Commission, whose order was approved by the Ohio Supreme Court, held that by reason of the foregoing the corporation was not operating in good faith in Ohio on April 28, 1923. The order of the Commission appearing in and approved in the opinion of the court is as follows:

> "The Commission further finds that the Red Ball Transit Company, a corporation, was not actually operating in good faith on April 28, 1923, in the State of Ohio, inasmuch as it is a foreign corporation, and did not comply with the laws of the State of Ohio respecting foreign corporations doing business in Ohio until June 1923.

> "For the reasons set out above, the Commission finds that the allegations contained in the affidavit filed by the company are untrue; that the certificate heretofore ordered to be granted to company was obtained through misrepresentation and false statements, and should therefore be revoked."

In California there was a statute of 1917 which is referred to in the Opinion of the Supreme Court of that state in *Motor Transit Company* v. *The Railroad Commission*, 209 Pac. 586, as "the former statute" and also a statute of 1919 referred to in the opinion as "the latter statute." In holding that a carrier by motor vehicles which had been operated in violation of the "former statute" could not be said to have been operating in good faith when the "latter statute" was passed, at page 590:

> "In the former statute no certificate was required of those operating in good faith prior to May 1, 1917. The latter statute relieves from the necessity of securing such a certificate companies operating in good faith "at the time this act becomes effective" (June 22, 1919). Manifestly, those companies commencing operations subsequent to May 1, 1917, without the certificate of public service and convenience required by the statute were violating the statute, and we cannot hold it to have been the intention of the Legislature to confer a franchise upon auto stage companies by virtue of their operation prior to the date the amendment went into effect, when such operation, by the very terms of the former statute, would have been illegal."

We think the foregoing cases fully establish the

proposition for which we contend, that the Petitioner by his failure to comply with all of the applicable state laws regulating certificates and permits to engage in interstate commerce over the highways of Texas was not in bona fide operation within the meaning of the Federal Motor Carrier Act.

ARGUMENT CONTINUED

POINTS V AND VI

The Texas Motor Carrier Statutes as heretofore held applicable to interstate transportation of property for hire by motor carriers are not regulations of interstate commerce or directed against such commerce but are recognized police powers reserved to the State to regulate the rights of the State and the public as to the use of its highways and preservation thereof, and promotion of safety thereon, and since such State regulations are equally applicable to interstate as well as to intrastate carriers without discrimination and they do not conflict with any expressed or assumed will of Congress expressed or necessarily implied in the Federal Act, they must be sustained, since the two acts can be reconciled and consistently stand together.

There is squarely presented to this Court the issue as to whether or nor the Railroad Commission of Texas operating within the sphere of its powers as a

statutory authority to protect the highways of the State from injury and destruction and to secure the safety and convenience of those primarily entitled to travel thereon has the authority, since the passage of the Federal Motor Carrier Act, to control the use of the highways by persons seeking such use in the prosecution of their business as carriers for hire thereupon and to deny such use to those who seek to so use such highways wholly in interstate commerce. The facts in this case present this precise issue to this Court. The petitioner on the first day of May, 1934 filed with the Railroad Commission of Texas an application for a certificate as a common carrier motor carrier operator in interstate commerce. The Commission heard the application after notice of the hearing had been given, hearing a mass of testimony and entered its Order on July 14, 1934, denying said application, setting out fully in said Order the reasons therefor (Exhibits C, D, and E, which are printed as supplement to the Record herein). An injunction against the Commisison restraining it from enforcing the order of denial was secured and the case went to the Court of Civil Appeals for the Third District, which dissolved the injunction. (90 S. W.(2d) 581).

The Court in its opinion copies somewhat at length from the Findings of Fact of the Railroad Commission of Texas as contained in Exhibit "E". It appears from this Exhibit and the opinion of the Court of Civil Appeals that the Commission had had before it a number of applications of the same na-

ture and in order to determine whether certain highways of the State were carrying all of the truck traffic that could safely be entrusted thereupon without unreasonably interfering with the use thereof by the general public it had held a number of hearings in various portions of the State in order that local officials familiar with the condition of the highways, and the amount of traffic that such highways were forced to carry, might be able to testify. It appeared that more than one hundred County Judges, Commissioners and others, newspaper editors, merchants testified against granting of additional truck permits over the particular highways which petitioner sought to use. The testimony conclusively shows that it was impossible for an ordinary passenger car and a truck of a width permitted under the law to pass each other upon these highways without one or both vehicles being compelled to traverse the dirt shoulder; the trucks, by reason of their weight, would hold the center of the road during wet weather and that this added to the hazards of the public in using the highways. It appeared from the testimony in this case that at the time this application was heard 500 trucks were authorized to operate as common carriers and 122 trucks as contract carriers over one of the principal highways which petitioner sought to use, and that in addition there were several hundred Special Commodity trucks operating over this highway. Upon these Findings of Fact by the Railroad Commission of Texas, as to the condition of the highways sought to be used by petitioner and the congestion thereon as to traffic, the Commission denied the permit.

The case of *Barnwell Bros.* v. *South Carolina Highway Department*, 17 Fed. Sup. 803 (Reversed on other grounds, 58 Sup. Ct. 510), was an attack upon the load limit of the State of South Carolina and a suit for injunction to restrain its enforcement as against interstate motor carriers. One of the grounds of attack was that Congress under the Federal Motor Carrier Act had superseded State laws as to the size and weight of vehicles, and the Court held that the congressional act was not subject to this construction, but clearly indicated that it was not within the purpose of Congress to take this police power from the states, and as to this issue raised in this case the Court said:

> "To sum up on this feature of the case, we do not think that there is anything in the language or in the history of the act which shows an intention on the part of Congress to regulate the size and weight of vehicles; and it is unreasonable to think that Congress would intend, by vague general language, to clothe the Commission with power to regulate a matter of such difficulty in which detailed regulations had already been prescribed by all of the 48 states, and thereby strike down all state regulations affecting the matter and leave the subject unregulated until such time as the Commission might act. Our conclusion as to the proper interpretation of the act is supported by the following recent decisions; L & L Freight Lines et al v. Railroad Commission of Florida (D. C. Fla.) 17 F. Sup. 13; Lower v. Stautamire, 123 Fla. 135, 166 So. 310; Railroad Commission v. Southwestern Greyhound Lines (Tex. Civ. App.) 92 S. W. (2nd) 296."

In the same case the Court in discussing the limit of the power of states in this regard said:

> "It must not be forgotten that the roads, in the final analysis, belong to the people. They are held by the states in trust for the people, who are entitled to make a reasonable use of them."

and that

> "Any regulation limiting size and weight, having reasonable relation to the preservation of the highways or to the safety of persons using them, must be upheld; and we do not doubt the power of the states in the reasonable exercise of the police power, to bar certain types of vehicles entirely from their roads, or entirely to forbid the use of trucks on certain of the roads provided other roads are available for the use of traffic of this character."

and in summing up the law as applicable to the relative rights of the states and of the federal government in regard to legislation with respect to use of the highways, said:

> "The law applicable to the situation is, we think, reasonably clear. There can be no doubt as to the power of the state to prescribe reasonable regulations limiting the size and weight of vehicles upon its highways, both for the sake of preserving the highways themselves and for the protection of the public using them. There is a broad range of legislative discretion with respect to such matters, and legislation is not to be condemned merely because the courts may

not agree as to its wisdom. Sproles v. Binford, 286 U. S. 374, 388, 52 S. Ct. 581, 585, 76 L. Ed. 1167; Morris v. Duby, 274 U. S. 135, 47 S. Ct. 548, 71 L. Ed. 966. But as indicated by the court in the case last cited (274 U. S. 135, at page 145, 47 S. Ct. 548, 550, 71 L. Ed. 966), such regulation must not be so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution toward the building of the highways. In other words, the states in the exercise of their inherent police power may regulate the use of the highways for the protection of the highways themselves and the safety of the public using them, and certainly in the absence of legislation by Congress may make such regulation applicable to interstate as well as intrastate traffic; but they may not adopt arbitrary regulations, not reasonably necessary for the protection of the highways or of the public, which will directly burden interstate commerce, even though such regulations may not discriminate as between commerce which is interstate and that which is not."

See also *L & L Freight Lines* v. *Railroad Commission of Florida*, 17 Federal Sup. 13; *Werner Transportation Co.* v. *Hughes*, 19 Federal Sup. 425; *Aero Mayflower Transit Co.* v. *Georgia Pub. Serv. Comm.*, 295 U. S. 285.

If the size and weight of motor vehicles have this undoubted relationship to the preservation of the highways and the safety of their use and Congress has not undertaken to regulate such sizes and weights under the Federal Motor Carrier Act, it seems to us that the conclusion is inescapable that

it was not intended by the said Act to deprive the states of their police power to determine as to whether any of its highways were in such condition, construction or repair, or the traffic thereon was such as to require a refusal of their use to persons engaged either in interstate or intrastate transportation for hire. The importance to the states of construing the Federal Motor Carrier Act so as to preserve this inherent police power of the states is accentuated by the provisions of Section 208 of the Act under the terms and provisions of which no condition or limitation can be placed upon the certificate granted by the Interstate Commerce Commission for interstate transportation that will restrict the right of the person to whom such a certificate is issued "to add to his or its equipment or facilities over the routes between the termini or within the territory specified within the certificate as the development of the business and the demands of the public shall require." Since, under this provision of the Federal Motor Carrier Act, the owner of an interstate certificate to engage in interstate commerce may without limit add to his or its equipment over the routes authorized by the interstate certificate, the states in the protection of their own highways and of the safety of the public thereupon would be crippled to the extent that its authority and powers would be nullified. It is further provided in said Section that carriers owning an interstate certificate may deviate from the route over which or the fixed termini between which it is authorized to operate. This again would give any common carrier in interstate commerce the right to use any of the

highways of the state, and the state's authority to determine as to whether they are in condition for use is nullified.

The complete justification in the action of the Railroad Commission of Texas in denying the petitioner authority to use the particular highways in interstate commerce is fully established in this case by the testimony of George A. Knapp as appears from his affidavit in the Record.

> "As at present constituted, the highway system of Texas comprises a total length of approximately 190,000 miles which includes the state designated highways having a mileage of 21,046, being approximately 11 percent of the total. The state designated highway system as composed includes a substantially large mileage of roads which in 1917 when the Texas State Highway Commission was created, were carved out of the county roads as they then existed. Highway requirements, considering the size and weight of the vehicles using the highways at that time, were adapted only to light automobiles, an occasional light truck and horse drawn vehicles. The best evidence of this fact is that the highway bridges were designed almost uniformly at that time for a safe load of 5 tons. While these inferior highways inherited by the State Highway Department from the counties, have in most instances been materially improved, and in many cases completely replaced by pavements of modern design, nevertheless, there are considerable lengths of the old roads which still remain and which occur at intervals throughout the present state system. These pavements may be identified by their non-rigid

types of constructions, their widths being invariably 18 feet or less, their sharp curves, steep grades, high crowns, irregular surfaces, eroded edges which may or may not have been patched, narrow earth shoulders and lightly constructed bridges. (R-48-49)

"Exhibit 2-A shows the width of the non-rigid pavements, excepting earth in the highway routes specified in the application filed by A. E. McDonald with the Texas Railroad Commission, the total length of which non-rigid pavements is 487.1 miles of which 15 percent are 16 feet or less, 60 percent are from 16 to 18 feet wide and total of 75 percent are 18 feet wide or less. (R-51)

"Exhibit 3-A shows the width of rigid pavements in routes specified in the application filed by A. E. McDonald, the total length of which rigid pavements is 607.5 miles of which 9 percent are 16 feet or less, 28 percent are from 16 to 18 feet wide, or a total of 37 percent which are 18 feet wide or less. (R-52)

"The large proportions of the total of both rigid and non-rigid pavements, which are shown in these Exhibits to be 18 feet wide or less, identified their inadequacy for the use of vehicles having a width in excess of 7 feet when consideration is given to the following: (R-52)

"The usual width of private passenger automobile is 6 feet or less. A minimum width of two lane pavement for the use of such vehicles may not be reasonably less than 16 feet. It is then obvious, in order to secure the same degree of mobility, clearance, and safety, that for vehi-

cles 7 feet wide, the pavement would have to be 18 feet wide and for the same reason, vehicles 8 feet wide would require a pavement width of 20 feet. Numerous measurements of the heavy commercial trucks made by me, show that this class of vehicle almost invariably measures the full width of 8 feet permitted by Texas law. These pavements of inadequate width for the use of the wider vehicles occur at frequent intervals throughout the length of practically all highways of the state including those in the routes specified in the application of A. E. McDonald." (R-52)

From this it appears that over the routes sought to be traversed by the petitioner there were 487 miles of non-rigid pavement 15 percent of which were 16 feet or less wide, 60 percent are from 16 feet to 18 feet and a total of 75 percent 18 feet wide or less; that the rigid pavements over said routes consist of 607 miles 9 percent of which are 16 feet or less, 28 percent from 16 to 18 feet wide, or a total of 37 percent of which are 18 feet width or less. He testifies that these pavements which are of inadequate width for the use of wider vehicles occur at frequent intervals throughout the length of practically all highways of the State including those in the routes specified in petitioner's application. This witness further testified as to the population of the State and the motor vehicle registrations in counties traversed by the highways over which Petitioner sought to operate, that:

"Attached hereto and made a part hereof is Exhibit 8 which sets forth the population and motor vehicle registrations in the counties tra-

versed by the identical highways shown in Exhibit 1-A, being those highways specified in the application of A. E. McDonald filed with the Texas Railroad Commission, as also a comparison of the population and motor vehicle registrations of such counties with similar date for the entire state of Texas. The summary of Exhibit 8 shows that while the counties along the routes applied for number only 13 percent of the total counties of the entire state the population of such counties amounts to 38 percent and the motor vehicle registrations 41 percent of the entire state. This study is not intended to show actual traffic over the highways, but rather the fact that these highways traverse a densely populated portion of the state, being approximately 3 times the average of the entire state, while the density of motor vehicle registrations is even greater. All of the traffic represented by these motor vehicle registrations is potential to the highways in their respective counties which are sought to be traversed by the applicant. Because of the fact that congestion on any highway may not be considered from the viewpoint of average use, but rather maximum or peak use, the facts of such greatly heavier density of population and motor vehicle registrations become significant in this case. It is to be noted that potential traffic from adjoining counties and from outside the State, all of which forms a substantial part of the actual traffic along these routes, has been omitted from the study.

"All the foregoing is offered as evidence identifying inadequacies in the highway and bridges of the state designated highway system to sustain heavy truck traffic without creating condi-

tions which will unreasonably interfere with the public use of such highways and bridges." (R-64-65).

This testimony taken in connection with the findings of the Railroad Commission of Texas in denying petitioner's certificate conclusively establishes the inadequacies of the highways and bridges to sustain any additional truck traffic without creating conditions to bring about damage to the highways, and unreasonable interference with the use by the public of such highways and bridges. The police power sought to be exercised by the state is a reasonable one and its exercise in this particular case has been reasonable; and petitioner does not question the reasonableness of the action of the state authorities, but bases his cause of action on grounds that the State laws as applied to him have been entirely superseded by the Federal Act. It has already been shown in this brief that Texas Motor Carrier Laws as construed applicable to interstate carriers are sustained as an exercise of the State's police power and not as a regulation of interstate commerce. *Sage* v. *Baldwin*, 55 Fed. (2d) 968; *Texport Carrier Corporation* v. *Smith*, 8 Fed. Supp. 28; *Wald Storage & Transfer Co.* v. *Smith*, 4 Fed. Supp. 61; *Galveston Truck Line Corp.* v. *Allen*, 2 Fed. Supp. 488; *Stephenson* v. *Binford*, 50 Fed. (2) 509.

The above cases and the evidence in the case at bar shows a necessity for the exercise of this reserved police power of the State, and this court in a long line of decisions has heretofore recognized the exercise of such power with limitation that it can-

not be operated to "*obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise.*" See *Bowman* v. *Chicago & N. W. Ry. Co.* 125 U. S. 465; *Railroad Company* v. *Husen*, 95 U. S. 465; *Cleveland R. Co.* v. *Ill.*, 177 U. S. 514; *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *and Robbin* v. *Shelby County Taxing District*, 120 U. S. 489 at page 493, par. 3, reading in part as follows:

> "It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities."

The Federal Motor Carrier Act does not contain any provision conflicting directly or impliedly with the applied exercise of the State's police power, and for such reason the State law should not be held to be superseded. See: *Kelley* v. *State of Washington*, 58 Sup. Ct. 87, where this court appropriately applied words used in *Savage* v. *Jones*, 225 U. S. 501, as follows:

> "*But the intent to supersede the exercise by the state of its police power as a matter not cov-*

ered by the Federal Legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

The above quotation announces a principle of law that this court has applied many times as shown by the citations and references in the case of *South Carolina State Highway Commission* v. *Barnwell Bros.*, 58 Sup. Ct. 510.

Certainly it cannot be claimed that the Federal Act has caused all the State's police powers to become inoperative as applied to interstate commerce. It could be argued with equal force that the Texas Speed Laws have become inoperative because of the Federal Act as to interstate carriers, but the Act clearly does not legislate on the subject of speed regulation, and until Congress definitely legislates upon the subject of speed regulation or highway conservation and regulation of traffic to prevent undue congestion and use of such highways, the State laws are operative. See: *M. P. R. Co.* v. *Larabee*, 53 Law Ed. 352; *Atlantic Coast Line R. R. Co.* v. *Georgia*, 58 Law Ed. 1312, where the State in absence of legislation by Congress specifically regulating headlights on locomotives may in exercise of its police power make requirements as to such headlights. *Sherlock, et al*, v. *Alling, Adm.*, 93 U. S. 105, where court said until Congress makes some regulation touching regulation of liability of parties for marine

rts resulting in death of persons injured the State ws applied. Other cases showing State free to act ntil Congress acts by assuming the entire field or irectly in conflict with the State law are as follows:

Texas & Pacific Ry. v. *Abilene Oil Co.*, 204 U. S. 26, where right of shipper to sue for damages un- er state law was abrogated on the ground that e reasonableness of the interstate rate is a mat- r the Interstate Commerce Commission must pass pon, as the Interstate Commerce Act dealt specifi- lly with the subject of rates. In *M. K. & T. P. Ry.* o. v. *Harris*, 234 U. S. 412, it was held the Carmack mendment did supersede state laws as to carrier's ability for loss of interstate shipment, *but* did not terfere with state statute incidentally affecting the emedy of enforcement by allowing a reasonable at- rney fees on small claims not over $200.00. The mendment made no provision for attorney fees and exas Statute was sustained as an exercise of the ate's police power, and the court said in absence direct conflict with the Federal Act it must be sus- ined. In *Chicago R. I. and Pac. Ry. Co.* v. *Hard- ick Farmers Elevator Co.*, 226 U. S. 427, court said innesota Reciprocal Demurrage Act was specifi- lly superseded by the Hepburn Act since the two ts were in direct conflict as each dealt with the me subject. 251 U. S. 27, *Postal Tel.-Cable Co.* *Warren-Godwin Co.*, where it was shown that the t of Congress in 1910 to regulate Interstate Com- erce dealt sufficiently with rates for unrepeated ssages as to supersede state law as to liability

for error in sending such messages. In the case of *Napier* v. *Atlantic Coast Line Co., et al*, 272 U. S. 605, it is held that the Federal Locomotive Boiler Inspection Act, as amended by Act March 4, 1915 and Act of June 7, 1924, had superseded all state laws regulating equipments on locomotives, but this case gives a history of the law as it existed prior to 1915 and shows specific action was then required by Congress to supersede a state law requiring a particular appliance on interstate equipment and gives many cases showing this court's approval. Other cases illustrating the powers of Congress to supersede and occupy entire field are *International Shoe Co.* v. *Pinkus*, 278 U. S. 261; Federal Bankruptcy held exclusive; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; Federal Hours of Service Act held exclusive; *New York Cent. Ry. Co.* v. *Winfield*, 244 U. S. 146; Federal Employee's Act held exclusive on the subject of the "responsibility of interstate carriers by railroads to their employees injured in such commerce." In all of these cases where act of Congress has been held to supersede state police powers, the Congress has definitely used language to indicate its intent to supersede, and we believe if it had intended to supersede the Texas police powers involved in this case, it would have spoken specifically on the subject of highway conservation and traffic regulation. Under decisions of this court in the Minnesota Rate Case, 230 U. S. 412 and *Houston E & W T. R. Co.* v. *U. S.*, 234 U. S. 342, if the Act grants the authority to regulate as to matters herein involved, certainly it could not be contended the power may be exercised until the Interstate Com-

merce Commission makes findings showing a necessity for its action to protect interstate commerce.

ARGUMENT CONTINUED

POINT VII

In the absence of any provision in the Federal Motor Carrier Act to supersede the police power of the states as applied and recognized at the time the Federal Act was passed, it cannot be supposed that Congress had "attempted to override the accustomed authority of the states without the provision of a substitute."

The "accustomed authority of the states" prior to and at the time the Federal Act was passed is thoroughly reviewed and established in this brief under our argument of Points V and VI.

This court in the Minnesota Rate Case, 230 U. S. 412, at pages 420-421, in construing the Interstate Commerce Act used language appropriate to our point here as follows:

> "Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the

proposition that the Act to Regulate Commerce contemplated interference therewith.

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. *It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute.* On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject. Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612, 620, 621."

In the case of *South Carolina State Highway Department* v. *Barnwell Bros.*, 58 Sup. Ct. 510, at pages 516-17, this court said:

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that

is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause, Const. art. 1, Sec. 8, cl. 3; as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. Sproles v. Binford, supra; Stephenson v. Binford, 287 U. S. 251, 272, 53 S. Ct. 181, 187, 77 L. Ed. 288, 87 A. L. R. 721."

The point here is sound because the Federal Government's control over interstate commerce may be protected by the courts when the states' exercise of police powers are administered in such a manner as to constitute an undue burden on interstate Commerce, or as to discriminate as to such commerce. *Morris* v. *Duby*, 47 Sup. Ct. 550, *South Carolina State Highway Department* v. *Barnwell Bros.*, 58 Sup. Ct. 510, *Railroad Co.* v. *Husen*, 95 U. S. 465; *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Houston, E. & W. T. R. Co.* v. *U. S.*, 234 U. S. 342.

The power of the courts over Interstate Commerce against undue burdens or discrimination, however, is limited, it would seem, by a provision found in the Federal Motor Carrier Act as follows:

"Sec. 316(e) .... Provided, however, that noth-

ing in this chapter, shall empower the commission to prescribe, or in any manner regulate, the rates, fares, or charges for intrastate transportation, or for any service connected therewith for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

There is no contention in this case that the Railroad Commission has acted unduly or discriminatorily against petitioner or has denied him the right to use all the highways of Texas, as the denial was applicable to the particuar highways mentioned in his application. There, no doubt, were other highways in the state that the Railroad Commission could not deny him the use of because conditions of such highways might be different. (See R. 32). The evidence in this case shows the commission was willing to grant him authority over any of the state highways where highway and traffic conditions would permit. This was shown by Respondents answer which is a part of the record evidence in this case. (See R. 32).

ARGUMENT CONTINUED

POINT VIII

If the State Motor Carrier Laws are not superseded as to the state's right to exercise its police power applicable to highway use and traffic regulation as contended in this brief, then the use of the words, "bona fide

operation" in sections 309 and 306 of the Federal Motor Carrier Act must be given a meaning consistent with the general purposes of the Act.

The above proposition needs no citation of authorities as clearly where words are used in an act capable of different constructions the construction in accord with the intent of the act whether expressed or implied for failure to make expression must be adopted. In the case of *Burnet, Commissioner of Internal Revenue* v. *Chicago Portrait Co.*, 285 U. S. 1, this court in construing the meaning of the words "foreign country" as used in the Revenue Act of 1921 used language as follows:

> "The term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation."

In the case of *Porto Rico Ry. Co.* v. *Mor.*, 253 U. S. 345, this court said:

> "If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress."

Again the failure of Congress to specifically legislate as to highway use and conservation and regulation as to traffic congestion on such highways must be construed as intent of Congress that the words "bona fide operation" as used would not raise the constitutional question as to the Federal Govern-

ment's power to assume control of such police powers of the state, but that such words would be construed so as to avoid such constitutional question. See *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204 where this court quotes from its former opinion in the case of *U. S.* v. *Delaware & Hudson Co.* 213 U. S. 366 as follows:

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

The trial court in the case at bar held the Federal Act had superseded the state statutes so far as the state act gave the Railroad Commission authority to forbid interstate carriers to use the highways. (R. 37). Also, the phrase, "if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935" as used in the Federal Act, meant actual, physical, continuous and regular operation of such carrier on June 1, 1935 and continuously ever since and as a matter of law that petitioner was in bona fide operation on and prior to June 1, 1935 and since. (R. 37 & 38). Clearly this holding was error from what has heretofore been said and the circuit court properly reversed the case.

Our position is that the term "bona fide operation" so far as applied to Texas highways could mean nothing more than "lawful operations," and since

this point has been further developed in our argument under Point IV we will not discuss it further.

This court has jurisdiction in this case to judicially determine the meaning of the words, "bona fide operation" as used in the Federal Motor Carrier Act. See: *Texas & Pacific Ry. Co.* v. *Gulf Colo. & Santa Fe Ry Co.*, 70 Law Ed. 578; Great Northern *Ry. Co.* v. *Merchants Elevator*, 66 Law (Ed.) 943, 259 U. S. 284; *Atchison T. & S. Ry. Co.* v. *U. S.*, 98 Fed. (2d) 457.

WHEREFORE Respondents pray judgment of this court affirming the judgment as rendered in this case by the United States Circuit Court of Appeals, Fifth Circuit.

Most respectfully submitted,

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APPENDIX

Part of Texas Motor Carrier Laws (Art. 911B Vernon's Ann. Civil Statutes of Texas, being chapter 277, Acts of 1931, 42nd Legislature) as follows:

Section 4 (d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public.

The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any mu-

nicipality through or between which motor carriers operate.

Section 16 (a), (b) and (c) (shown in Vernon's Annotated Penal Code of Texas as Article 1690b):

"(a) Every officer, agent, servant or employee of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this Act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand, or requirement of the Commission shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than Twenty-five Dollars ($25.00), nor more than Two Hundred Dollars ($200.00), and the violations occurring on each day shall each constitute a separate offense."

"(b) Every officer, agent, servant or employee of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this Act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand or requirement of the Commission shall in addition be subject to and shall pay a penalty not exceeding One Hundred Dollars ($100.00), for each and every day of such violation. Such penalty shall be recovered in any Court of competent jurisdiction in the county in which the violation occurs. Suit for such penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the County or District

Attorney in the county in which the violation occurs, in the name of the State of Texas."

"(c) Upon the violation of any provision of this Act, or upon the violation of any rule, regulation, order or decree of the Commission promulgated under the terms of this Act, any District Court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act or from further violating any of the rules, regulations, orders and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any District or County Attorney. No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General or any District or County Attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this Section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision."

Section 22(b) Declaration of Policy—The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulations should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of

such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public.